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No. 87-1159

In the Supreme Court of the United States

OCTOBER TERM, 1987

CNA FINANCIAL CORPORATION, ET AL., PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were entitled to de novo review by the district court of their claim that the information at issue in this case is exempt from disclosure under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), and protected from disclosure by the Trade Secrets Act, 18 U.S.C. 1905.

2. Whether the administrative procedures followed in reviewing petitioners' objections to disclosure were consistent with the requirements of the Due Process Clause and the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. IV) 701 *et seq.*

3. Whether the coverage of the Trade Secrets Act is co-extensive with the coverage of Exemption 4 of the FOIA.

4. Whether the Trade Secrets Act is a "withholding statute" within the terms of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 830 F.2d 1132. The opinion of the district court (Pet. App. 130a-141a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a) was entered on September 29, 1987. A petition for rehearing was denied on December 1, 1987 (Pet. App. 144a). A petition for a writ of certiorari was filed on January 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are three affiliated insurance companies that do business with the federal government (Pet. App. 3a-4a). Like all other businesses receiving federal contracts

and thus covered by Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Comp.), petitioners annually submit affirmative action plans and "EEO-1" reports to an appropriate federal agency (Pet. App. 4a-5a). These affirmative action plans and EEO-1 reports set forth, among other things, the number, race, and sex of persons that petitioners employ in nine occupational categories (*id.* at 4a-5a & n.10).

In April 1977, petitioners were informed by the Insurance Compliance Staff (ICS) of the Department of Health, Education, and Welfare (HEW), the agency then charged with responsibility for monitoring petitioners' compliance with Executive Order No. 11,246,[1] that a group called Women Employed had filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552, that concerned information relating to petitioners (Pet. App. 6a). Specifically, Women Employed sought disclosure of two of petitioners' affirmative action plans, EEO-1 reports of petitioners, any reports prepared by the ICS in its assessment of petitioners' compliance with the Executive Order, and any agreements reached between petitioners and the ICS in light of such reports (*id.* at 6a, 72a-73a). Petitioners objected that some of the documents "contain[ed] confidential information which should not be released" (*id.* at 74a). The ICS responded that the objection was too general and that petitioners would have to provide more specific objections in order to

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[1] The responsibility for implementing Executive Order No. 11,246 was originally divided among various federal agencies and departments (Pet. App. 5a n.11). On October 1, 1978, the responsibility for monitoring compliance of government contractors was consolidated in the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (*ibid.*). This transfer of functions explains why the heads of OFCCP and the Department of Labor were named as defendants in this suit (*ibid.*).

prevent the information's release (*ibid.*). After petitioners failed to submit such objections, the ICS decided to release a substantial portion of the requested materials and notified petitioners of this decision (*id.* at 74a-75a).

Petitioners responded by filing an action in district court, praying that ICS be enjoined from releasing the information, and a petition for administrative review with the Office of Federal Contract Compliance Programs (OFCCP) (Pet. App. 6a-7a). In the district court action, the parties stipulated that the information would not be released until the administrative review procedures had been completed (*id.* at 7a & n.15). In the administrative proceeding, petitioners submitted detailed objections, including a five-volume index, concerning why disclosure would not be proper; petitioners principally complained that disclosure of the requested materials would subject them to adverse publicity and competitive harm (*id.* at 53a-54a). After reviewing these objections, the OFCCP reaffirmed the decision that the requested information should be released (*id.* at 75a-76a).

2. Petitioners sought judicial review of OFCCP's decision and prayed that the district court enjoin any disclosure pending adjudication of the matter (Pet. App. 54a). The district court refused to grant the requested interim relief, but the Court of Appeals for the District of Columbia Circuit reversed that judgment (*id.* at 54a-55a); it determined (*ibid.*) that the release of the information and all judicial proceedings should be stayed pending the issuance of this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). After the *Chrysler Corp.* decision issued, the court of appeals further ordered that the case be remanded to the OFCCP "to make [a] new administrative determination[] in accordance with [its] normal rules of practice and in light of the [*Chrysler Corp.* decision]" (Pet. App. 70a).

On remand, petitioners requested that a hearing be held so that they could present evidence and examine the persons on whom the OFCCP would rely in making its decision (Pet. App. 79a). The OFCCP denied this request (*ibid.*). Instead, it provided petitioners with a list of the documents that it believed were relevant to their claim and invited them to provide new submissions for the agency to consider in passing on their objections (*id.* at 79a-80a). Petitioners did not respond to this invitation (*id.* at 80a). The OFCCP then reconsidered petitioners' objections and again determined that the requested information should be released, albeit with some editing to respect individual employees' privacy and to minimize any competitive utility of the information (*id.* at 7a & n.19, 72a-119a, 124a-129a). In making its decision, the OFCCP rejected (*id.* at 80a-82a) petitioners' argument that the Trade Secrets Act, 18 U.S.C. 1905,[2] is a nondisclosure statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3);[3] it noted that the argument was inconsistent with the legislative history of the FOIA and had been rejected by "[n]umerous federal courts" (Pet. App. 82a). Finally, the OFCCP held, contrary to petitioners' numerous argu-

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[2] The Trade Secrets Act, 18 U.S.C. 1905, criminalizes unauthorized disclosure of "information [which] concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any * * * [company] * * *."

[3] Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), exempts from mandatory disclosure material "specifically exempted from disclosure by statute, * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

ments,[4] that disclosure would not "cause substantial harm to [petitioners'] competitive position" and, accordingly, was not within the scope of Exemption 4 of FOIA, 5 U.S.C. 552(b)(4) (Pet. App. 84a-94a).[5]

Petitioners filed suit in district court to challenge this decision (Pet. App. 56a). While their complaint was pending, petitioners discovered that the OFCCP had consulted an outside expert—Professor Boyd Fjelsted—to review

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[4] The OFCCP found petitioners' argument that the public, potential job applicants, and independent agents might misconstrue the import of its "applicant flow" data to be "purely speculative" and contrary to "common sense" (Pet. App. 86a, 88a). It found petitioners' suggestion that disclosure might cause termination of relations with the government confused, noting that "[t]hese figures already have been submitted to the Government," and that "[d]isclosure of the documents at issue to the public is irrelevant to the Government's determination of whether [petitioners'] Executive Order obligations have been met" (*id.* at 88a-89a). It found no support for petitioners' argument that release of the data "could aid a competitor * * * in directing its recruiting efforts" (*id.* at 89a), noting that the information about "[petitioners' recruitment] sources [is] extremely general, for example, 'walk-in,' 'newspaper ad,' 'employee referral,' 'agency,' " and adding that these "kinds of recruitment sources are surely no revelation to a competitor," and, in any event, that "[petitioner's] recruitment data is dated" (*id.* at 89a-90a). Finally, the OFCCP dismissed petitioners' claim that release of its staffing information would allow a competitor to divine petitioners' marketing and service strategy, finding that the data in question are "quite stale," that "much information about [petitioners'] profitability, compensation practices, and regional workforce staff size is already in the public record," and that "the most a rival could gain from the staffing information * * * is some vague, indefinite insight into the firms' priorities (as of 1975 and 1976) which would not be of significant competitive value" (*id.* at 92a-93a (footnote omitted)).

[5] Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), removes from the mandatory disclosure requirement "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

their submissions and to render an opinion on the substantiality of the competitive threat they described (*ibid.*). Petitioners demanded they be given an opportunity to review and respond to Professor Fjelsted's report (*id.* at 56a-57a). The district court, after conducting an in camera inspection, agreed with the OFCCP that the report constituted "deliberative materials" of an "agency decisionmaker" and, accordingly, that it was privileged and outside the scope of permissible discovery (*id.* at 57a). The court did remand the case to the OFCCP, however, for consideration of three affidavits that were inadvertently excluded from the agency record (*id.* at 122a-123a). But, on remand, the OFCCP denied petitioners' renewed request for an evidentiary hearing and again determined that disclosure was the proper course (*id.* at 58a).

3. On review, the district court determined that the OFCCP was entitled to summary judgment (Pet. App. 130a-141a). It rejected petitioners' argument that the agency's regulations required that a trial-type proceeding be followed in reviewing these disclosure objections (*id.* at 136a-137a); on the contrary, the court found that the regulations contemplate only "an informal 'paper hearing' on the company's objections" (*ibid.*). It also rejected petitioners' claim that they have a due process right to an oral hearing (*id.* at 138a-140a), finding that an oral hearing would contribute little to the accuracy and reliability of OFCCP's disclosure decisions and, concomitantly, that a trial-type procedure would involve substantial fiscal and administrative burdens. Finally, the court ruled that "the OFCCP's conclusion that the Trade Secrets Act[] is not an exempting statute under the third exemption of FOIA, but is coextensive with the fourth exemption, is amply supported by judicial precedent" (*id.* at 141a, citing *General Motors Corp.* v. *Marshall*, 654 F.2d 294 (4th Cir. 1981));

that "the agency's decision thoroughly discusses [petitioners'] objections and presents 'a reasoned and detailed basis for its decision' " (Pet. App. 141a (citation omitted)); and that "[petitioner] has provided, and the Court is aware of, no reason why this proceeding should be considered so extraordinary * * * to merit *de novo* review by this Court" (*ibid.*).

4. The court of appeals affirmed (Pet. App. 1a-68a). It agreed "with the District Court that 'the agency's decision * * * presents 'a reasoned and detailed basis for its decision,' " that "the agency's decision to release the documents found to be outside Exemption 4 must be upheld," and that "the procedures employed by OFCCP were legally sufficient" (*id.* at 67a-68a).

The court first rejected petitioners' argument that the Trade Secrets Act is a withholding statute within the terms of subsections (A) and (B) of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3)(A) and (B) (Pet. App. 10a-24a). As to subsection (A), the court stated that it "embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is 'absolute and without exception' " (*id.* at 12a (citations omitted)); and the court found that, under *Chrysler Corp.* v. *Brown, supra,* an agency retains discretion under the Trade Secrets Act to "adopt substantive regulations governing public access to its files" (Pet. App. 13a), discretion that is fatal to a subsection (A) claim (*id.* at 13a-14a). As to subsection (B) of Exemption 3, the court stated that it authorizes nondisclosure only where another statute establishes " 'particular criteria for withholding' " or refers to " 'particular types of matters to be withheld' " (*id.* at 14a (citation omitted)). The court then found that, as to the first prong of this test, "[t]he Trade Secrets Act is patently deficient * * *," because "nothing in the Act directs or guides an agency in deciding whether it ought to exercise its power to

authorize revelation of officially collected commercial and financial data" (*ibid.*), and that, as to the second prong of the test, the " 'oceanic' quality of the Act * * * 'undermines any notion that [the statute] represents a congressional determination of the advisability of secrecy for any "particular type[] of matter[]" ' " (*id.* at 16a-17a (citations omitted)).[6]

The court next addressed the question whether Exemption 4 of FOIA, when viewed together with the Trade Secrets Act, bars disclosure of the requested materials (Pet. App. 25a-53a). In answering this question, the court first considered the "position taken by some commentators, and urged here by agency counsel, that * * * the Trade Secrets Act is no broader than its three predecessor statutes were combined" and, accordingly, that the OFCCP has discretion to release materials that fall within the exemption but not within the Trade Secrets Act (*id.* at 25a-26a (footnote omitted)). After conducting an exhaustive analysis of the history of the Trade Secrets Act, the court concluded that "the scope of the Act is at least co-extensive with that of Exemption 4 of FOIA, and that, in the absence of a regulation effective to authorize

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[6] The court noted (Pet. App. 19a n.62) that its "holding that the Trade Secrets Act is not an Exemption 3 statute is consistent with the conclusions of several courts that have considered the question." It further noted (*ibid.*) that, while the Fourth Circuit reached a contrary conclusion in *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (1976), cert. denied, 431 U.S. 924 (1977), "[t]hat decision was premised * * * on the Supreme Court's ruling in *FAA* v. *Robertson*, [422 U.S. 255 (1975)]," and that, "[s]ince the 1976 amendments to FOIA have undermined that approach, several courts have regarded the *Westinghouse* holding as effectively overruled" (Pet. App. 19a n.62). Indeed, the court added, "[i]n a recent statement on the subject, the Fourth Circuit has implicitly suggested that it no longer regards the Trade Secrets Act as an Exemption 3 statute" (*ibid.*, citing *General Motors Corp.* v. *Marshall*, 654 F.2d 294 (4th Cir. 1981)).

disclosure, the Act prohibits OFCCP from releasing any information in [petitioners'] affirmative action programs and EEO-1 reports that falls within Exemption 4" (*id.* at 42a-43a (footnotes omitted)).

The court went on, however, to reject "[petitioners'] contention that OFCCP erred in its interpretation and application of the legal standard summoned by FOIA Exemption 4" (Pet. App. 43a). It noted that the OFCCP "explicitly stated the proper standard to be applied" (*id.* at 45a (footnote omitted))—whether disclosure " 'is likely to * * * cause substantial harm to the competitive position of the person from whom the information was obtained' " (*id.* at 44a, quoting *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974))—and "decline[d] [petitioners'] invitation to abandon th[at] * * * standard" (Pet. App. 45a n.146). On that view, the court confined its review "to the question whether OFCCP had correctly applied that standard to the facts of this case" (*id.* at 45a-46a), and found OFCCP's determination that disclosure would not cause substantial competitive harm to petitioners to be entirely rational (*id.* at 48a-53a).[7]

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[7] The court found that "much of the information sought by [petitioners] to be confined is already publicly available" (Pet. App. 48a). It also rejected petitioners' argument that disclosure was improper because it would cause adverse publicity, noting that "such complaints [are] unrelated to the policy behind Exemption 4 of protecting submitters from external injury" (*id.* at 49a). Finally, as to petitioners' arguments concerning the long-range consequences of releasing the data, the court found itself "presented [with] no more than two contradictory views of what likely would ensue upon release of [the contested] information * * *. [Petitioners'] objections were answered fully, and OFCCP's explanations of anticipated effects were certainly no less plausible than those advanced by [petitioners]" (*id.* at 50a-51a). The court thus concluded that the OFCCP's decision "cannot in any way be characterized as arbitrary, capricious, or an abuse of discretion" (*id.* at 51a).

The court similarly found no merit in petitioners' claim that they were entitled to additional procedures before the agency and the district court (Pet. App. 53a-67a). It agreed with the district court that the OFCCP's regulations "make[] no mention of an evidentiary hearing or indeed of any review procedures at all" (*id.* at 60a). It found that "[h]ardly more substantial is [petitioners'] claim that the agency factfinding procedures ran afoul of Section 10 of the Administrative Procedure Act and impinged on the full spectrum of review assured by the Due Process Clause" (*ibid.*); in this regard, it noted that it had previously rejected such a claim in *National Org. for Women* v. *Social Security Admin.*, 736 F.2d 727 (D.C. Cir. 1984) (*NOW*) (the APA and the Due Process Clause generally require no more than notice of the agency's decision and an opportunity to present relevant evidence to responsible agency officials), and ruled that "[t]he holding in *NOW* is dispositive on this issue" (Pet. App. 60a). The court then rejected petitioners' contention that they were entitled to receive a copy of Dr. Fjelsted's report (*id.* at 60a-66a), noting that, "[w]hen agency material is 'deliberative' or 'recommendatory' in character, and does not of itself inject new factual data into the calculus, the agency is privileged to withhold it" (*id.* at 62a-63a), and finding that this report "did not provide any new data" (*id.* at 63a) and "consist[ed] solely of analyses of data and recommendations of agency action predicated thereon" (*id.* at 64a).

Finally, the court rejected petitioners' claim that they were entitled to de novo review by the district court of the OFCCP's decision (Pet. App. 66a-67a). It noted that this Court's decisions in *Camp* v. *Pitts*, 411 U.S. 138 (1973) (per curiam), and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), "authorize de novo judicial review * * * only when the agency's factfinding proce-

dures are 'inadequate' " (Pet. App. 67a). It then found that the "decision in *NOW* upheld the procedures employed by OFCCP in reverse-FOIA actions—procedures which have largely been replicated here" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals; indeed, as petitioners concede (Pet. 7-8), the decision below represents the first appellate consideration of the questions left open by this Court in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), and numerous reverse-FOIA cases have been held in abeyance by other courts pending the resolution of this case. In such circumstances, review by this Court would be premature and inappropriate.

1. Petitioners first suggest (Pet. 9-11) that the courts of appeals are in conflict concerning whether de novo review is available in reverse-FOIA actions. This suggestion of a circuit conflict is, of course, inconsistent with petitioners' concession that the decision below is the first appellate consideration of the de novo review issue since the decision in *Chrysler Corp.* v. *Brown, supra*, was rendered. In any event, there is no conflict among the circuits. Based on this Court's decisions in *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam), and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414-415 (1971), the courts of appeals, including the court below, have uniformly held that de novo review is available in reverse-FOIA cases only where the agency's factfinding procedures are "inadequate." See, *e.g.*, Pet. App. 67a; *General Motors Corp.* v. *Marshall*, 654 F.2d 294, 298-300 (4th Cir. 1981); *Porter* v. *Califano*, 592 F.2d 770, 784 (5th Cir. 1979). Petitioners misread both the opinion below and the opinion in *NOW* when they suggest (Pet. 10-11)

that the Court of Appeals for the District of Columbia Circuit follows a "severely defective" procedures standard; in both cases, the court said that de novo review would be available only in cases where agency factfinding procedures are "inadequate." See Pet. App. 67a; *National Org. of Women* v. *Social Security Admin.*, 736 F.2d at 745.[8]

2. Petitioners further err in suggesting (Pet. 14-16) that the factfinding procedures used by the OFCCP in evaluating their objections to disclosure were inadequate. As the initial reviewing agency, the ICS notified petitioners of the request for disclosure and entertained petitioners' initial objections. The OFCCP then considered petitioners' appeal of the ICS's decision; in doing so, it allowed petitioners to make additional objections, to submit any evidence that they wished in support of their objections, and to review the evidence on which OFCCP intended to rely.[9] As a consequence, the OFFCP was able to

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[8] Petitioners' suggestion (Pet. 10) that the availability of de novo review should be "a function of the complexity of the factual issues presented" is irreconcilable with this Court's observation in *Chrysler Corp.* v. *Brown, supra*, that "*[d]e novo* review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of [the Trade Secrets Act]" (441 U.S. at 318). Exemption 4 determinations are necessarily fact-bound; thus, under petitioners' proposed standard, de novo review would be the rule rather than the exception.

[9] Petitioners err in suggesting (Pet. 14-15) that the OFCCP did not inform them of the issues involved in the case nor provide them with the evidence on which it ultimately based its decision. The OFCCP informed petitioners that, unless they presented valid objections, the information requested by Women Employed would be released; it thus informed them of the relevant issue—whether this information should be released—and "the onus was on [petitioners] to demonstrate that the materials should be exempt from FOIA's general requirement of disclosure" (Pet. App. 137a). Moreover, while OFCCP did not pro-

reach a reasoned decision in the case, in fact withheld some of the materials that petitioners did not want released, and provided a detailed explanation as to why it was releasing the rest of the materials in issue. While petitioners may be upset with the agency's final decision in this matter, the procedures they received were in no sense "inadequate." Indeed, the only additional procedure which petitioners could have received is an oral hearing, but "the absence of such a hearing does not render the procedures inadequate, for the procedures in *Camp v. Pitts* were found adequate without having provided such a hearing" (*National Org. of Women* v. *Social Security Admin.*, 736 F.2d at 746).

3. Petitioners also err in suggesting (Pet. 12-13) that the question whether the Trade Secrets Act and Exemption 4 of the FOIA have the same scope merits review by this Court. For one thing, the relative scope of the two provisions is not presented by the facts of this case. The OFCCP has determined that the material in issue falls outside of Exemption 4; the district court and the court of appeals have sustained that determination; and petitioners have not challenged the determination in this Court. Thus, the question whether the Trade Secrets Act bars disclosure of materials within Exemption 4 is not presented by the facts of the case. In any event, even if the issue were presented, it would not be petitioners' place to raise it for the Court's review. The court below held that, where information falls within Exemption 4, the OFCCP must withhold the information. Had the court held that the

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vide petitioners with a copy of Professor Fjelsted's report, that report was simply not "evidence" which petitioners were entitled to receive; it was not factual testimony, but rather "consist[ed] solely of analyses of data and recommendations" (*id.* at 64a), which are privileged.

Trade Secrets Act covers less information than does Exemption 4, the OFCCP would have discretion to disclose information falling within the exemption but outside of the Trade Secrets Act. Thus, it is the government, not petitioners, that would benefit from a reversal of the court's holding on this score.[10]

4. Finally, petitioners contend (Pet. 13-14) that the decision below conflicts with the decision in *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977), and that the Trade Secrets Act is in fact a withholding statute within the terms of Exemption 3 of the FOIA. But, as the court below explained (Pet. App. 19a n.62), the Fourth Circuit's decision in *Westinghouse* was predicated on this Court's decision in *FAA* v. *Robertson*, 422 U.S. 255 (1975), which was overruled by Congress in its 1976 amendments to Exemption 3. Since the enactment of the current version of Exemption 3, no other court has adopted the *Westinghouse* approach. See, *e.g.*, *General Elec. Co.* v. *United States Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1401-1402 (7th Cir. 1984); *General Dynamics Corp.* v. *Marshall*, 607 F.2d 234, 235-236 (8th Cir. 1979). Indeed, the Fourth Circuit has itself quoted with apparent approval the legislative history of the 1976 amendments that indicates that Exemption 3 does not encompass the Trade Secrets Act (*General Motors Corp.* v. *Marshall*, 654 F.2d at 297 n.9). Thus,

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[10] Petitioners suggest (Pet. 13) that the "substantial competitive harm" standard somehow "modifies the plain language of § 1905" and thus makes the relative scope of the two statutes an issue of concern to them. But the "plain language" of Section 1905 only penalizes disclosure "not authorized by law" (18 U.S.C. 1905). The "substantial competitive harm" test asks whether disclosure that is otherwise required by law is exempt; thus, while the absolute scope of the two statutes is affected by the "substantial competitive harm" standard, the relative scope of the two statutes is not affected.

petitioners' contention that a circuit conflict exists on this issue is unfounded and, as the thorough discussion by the court below reveals (Pet. App. 10a-24a), the Trade Secrets Act plainly does not satisfy the requirements of either subsection (A) or (B) of Exemption 3 of the FOIA.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] The conclusion that the Trade Secrets Act is not a withholding statute under Exemption 3 is fully consistent with our position in *United States Dep't of Justice* v. *Julian*, cert. granted, No. 86-1357 (June 15, 1987). In *Julian*, we noted that Fed. R. Crim. P. 32(c)(3), which provides for the withholding of presentence investigation reports, "speaks with uncommon particularity" (Gov't Br. 44). This narrow focus is in marked contrast to the " 'oceanic' quality of the [Trade Secrets] Act" (Pet. App. 16a-17a). The qualitative distinction between the issue presented in *Julian* and that presented by petitioners makes it unnecessary to hold the present petition pending the decision in *Julian*.

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